UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD REGION 10

KUMHO TIRES GEORGIA

and

Cases 10-CA-208255
10-CA-208414
10-RC-206308

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Kami Kimber
Matthew J. Turner
Counsel for the General Counsel
National Labor Relations Board, Region 10

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. INTRODUCTION

Pursuant to Section 102.46(b) of the Boards Rules and Regulations, as amended, Counsel for General Counsel hereby submits this Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision. Counsel for the General Counsel argues that the Board should adopt the Administrative Law Judge's credibility determinations and findings that Respondent violated the Act as alleged in the complaint.

II. STATEMENT OF THE CASE

On September 18, 2017, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial & Service Workers International Union, AFL-CIO, CLC ("Union") filed a petition to represent certain employees of Kumho Tires Georgia ("Respondent") located at 3051 Kumho Parkway in Macon, Georgia. On September 21, 2017, the parties executed a Stipulated Election Agreement. The Board held an election on October 12 and 13, 2017.

On October 20, 2017, Petitioner filed Objections in Case 10-RC-206308. Petitioner also filed unfair labor practice charges in Cases 10-CA-208255 and 10-CA-208414 on October 19, 2017 and October 23, 2017, respectively. On July 31, 2018, the Regional Director issued a Consolidated Complaint and Notice of Hearing, which consolidated the cases, and set a hearing on the alleged unfair labor practices and objections. A hearing was held from March 18 to March 22, 2019 before Administrative Law Judge Arthur J. Amchan.

On May 14, 2019, the Administrative Law Judge ("ALJ") issued a Decision on the alleged unfair labor practices and the election objections. The ALJ found multiple unfair labor practices

and that certain objections had merit and warranted a new election and remedial order. On June 25, 2019, Respondent filed exceptions to the ALJ's Decision.[1]

Counsel for the General Counsel argues that the Board should adopt the ALJ's credibility determinations and findings that Respondent violated the Act as alleged in the complaint.

III. BACKGROUND FACTS

A. Respondent's Business Operations

Respondent has operated a tire manufacturing company in Macon, Georgia since about the beginning of 2016. (ALJD 2:18; Tr. 16).[2] Respondent maintains a workforce of approximately 350 hourly production employees in addition to its salary exempt supervisors and managers at its facility located in Macon, Georgia ("Macon facility"). (Tr. 187). Respondent's Macon facility is made up of several departments, including the curing department, semi production department, automated production unit (APU), mixing department, inspection, quality, and the warehouse. (Tr. 495-496). The Employees work 12-hour shifts and work rotating days on a two-week work schedule. (Tr. 16-17). Employees also rotate between day and night shift every 28 days. (Tr. 17).

A description of Respondent's management hierarchy will be limited to those supervisors and or agents relevant to this case. Respondent admits that the following individuals were

[1] On July 25, 2019, Counsel for the General Counsel motioned the Board to sever Case 10-RC-206308 and remand the case to Region 10 to process the Union's request for withdrawal. The motion remains before the Board. As such, Counsel for the General Counsel will not address any of the issues or arguments that Respondent raised in its Brief in Support of Exceptions related to Case 10-RC-206308.

[2] All citation to the Administrative Law Judge's Decision will be referred to as "ALJD" followed by the page number and line number. Citations to the transcripts will be referred to as "Tr." followed by the page number. Exhibits will be referred to in the following manner, followed by the exhibit number: General Counsel exhibits as "GC Exh."; Respondent exhibits as "R Exh."; Union exhibits as "U Exh." and Administrative Law Judge exhibits as "ALJ Exh."

supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act: Hyunho Kim was the President of the Macon facility; Jerome Miller was the Chief People Officer; Michael Geer was a quality department supervisor; Sharon McCalla was a production supervisor; and Brad Asbell, Eric Banks, Lorenzo Brown, Chris Butler, Stevon Graham, Freddy Holmes, Aaron Rutherford, Harry Smith, Mike Walker, Mike Whiddon, and Chris Wilson were Team Leads over various departments and shifts in the Macon facility. (ALJD fn. 9; GC. Exh. 1(x)). Respondent admits that consultants Bill Monroe and Rebecca Smith are agents of Respondent within the meaning of Section 2(13) of the Act. (GC. Exh. 1(x)). The ALJ found safety coordinator Cliff Kleckley to be an agent of Respondent within the meaning of Section 2(13) of the Act. (ALJD 13:6).

B. Respondent's Response to the Union's Petition for Representation Election.

On September 18, 2017, the Union filed a petition for an election with Region 10 of the National Labor Relations Board in Case 10-RC-206308. (GC Exh. 1(a). Upon receipt of the petition, Respondent began to campaign in earnest against the Union by hiring a new Human Resources manager, Chief People Officer Jerome Miller and bringing in labor consultants to speak against the Union during frequent captive audience meetings. (ALJD 6: 13-15; Tr. 20-21, 76, 230, 265, 360, 424). Respondent also trained its supervisors and Team Leads regarding the campaign against the Union. (Tr. 449, 465, 480, 492, 519). Following this training, Team Leads who had previously been supportive of the Union joined Respondent in campaigning against the Union. (Tr. 128, 148, 153).

Eighteen witnesses, including 11 current employees, credibly testified for Counsel for the General Counsel that during the three weeks prior to the election, during pre-shift meetings and one-on-one conversations, Respondent began aggressively threatening employees with plant

shutdown and loss of work and contracts (ALJD 15:15-40; 16:13-36); via supervisors unlawfully interrogating employees regarding their Union support (ALJD 17:9-10; Tr. 24, 178, 197, 207, 220, 231, 236, 238, 362); and creating the impression of surveillance by telling employees that it was watching who posted on a pro-union website. (ALJD 18:41-19:3).

In addition to threats of plant shutdown and job loss and interrogating employees regarding Union sympathies, Respondent's supervisors threatened changed working conditions, discharge, changes to benefits, and unspecified reprisals. (ALJD18:8; 18:23;19:13; 19:25). For example, Respondent's supervisor Harry "Kip" Smith threatened changes in working conditions and benefits if the Union were voted in (ALJD 18:10-21), and Respondent's supervisor Aaron Rutherford unlawfully threatened employees with stricter enforcement of rules if the Union were voted in. (ALJD 19:30-31). Respondent's supervisor Michael Geer instructed an employee not to discuss the Union with coworkers (ALJD 18:23) and threatened discharge when he stated that Respondent needed to get rid of employees who voted for the Union. (ALJD 19:13; Tr. 261). Finally, in a mandatory meeting on the day before the election, Chief People Officer Jerome Miller threatened employees with plant shutdown, loss of work, futility, and loss of benefits if the Union were voted in. (ALJD 15:25-41; 16:1-8).

IV. ANSWER TO RESPONDENT'S EXCEPTIONS

Respondent submitted 66 exceptions to the ALJ's decision. In its brief, Respondent organized its exceptions into six separate arguments. Below, Counsel for General Counsel addresses Respondent's exceptions in five responses. Counsel for the General Counsel will not address Respondent's sixth argument concerning the ALJ's conclusions and findings regarding the voter list objection, based on the motion to sever and remand pending before the Board.

A. The ALJ's Credibility Determinations Are Supported by a Preponderance of the Record Evidence. [Respondent exceptions 3, 15, 17-20, 22-25, and 63-66].

i. Facts

Respondent excepts to the ALJ's credibility determinations, arguing that they indicate clear bias. Contrary to Respondent's contention, the ALJ clearly articulated the basis for his credibility determinations and cited to appropriate authority supporting his decisions.

The ALJ made credibility determinations by weighing several factors including the weight of the evidence established or admitted facts, inherent probabilities, and reasonable inferences. (ALJD 13:34-36). Eleven of Counsel for the General Counsel's witnesses were current employees at the time of their testimony and were deemed to be particularly reliable because they testified against their pecuniary interests. (ALJD 13:40-45). Of the other seven former employee witnesses, five voluntarily left employment for other opportunities, and Respondent terminated two individuals. (ALJD 13:47-48). Additionally, Counsel for the General Counsel's witnesses' testimony was consistent with uncontroverted statements made by Chief People Officer Jerome Miller and President Hyunho Kim. (ALJD 14:13-15).

Respondent's witnesses were all current or former supervisors or agents of Respondent. (ALJD 14:3). Respondent's witnesses denied the allegations in response to leading questions. (ALJD 14:4-6). Finally, the ALJ correctly credited Counsel for the General Counsel's witnesses where the testimony was uncontested and where Respondent's witnesses did not sufficiently address the testimony of Counsel for the General Counsel's witnesses. (ALJD 2:27; FN2). For example, the speech by Chief People Officer Miller is uncontested because Miller did not testify, and Respondent did not call any other witnesses to testify that the recording of Miller's speech was inaccurate. (ALJD 5:41-45).

ii. Argument

The Board gives great deference to an Administrative Law Judge's credibility determinations, only overturning an Administrative Law Judge's resolutions in instances where a clear preponderance of all the relevant evidence convinces the Board that the resolutions were incorrect. *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). The Board should affirm the ALJ's credibility determinations in the instant case.

At hearing, Counsel for the General Counsel called 18 witnesses on direct examination, all of whom testified in a straightforward, consistent, and detailed manner. Eleven Counsel for the General Counsel witnesses were current employees who testified against their own interests as employees and were therefore highly credible. The Board has consistently held that testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972). The Board has also held that the testimony of current employees is entitled to enhanced credibility. *Advocate South Suburban Hospital*, 346 NLRB 209, fn. 1 (2006); see also *American Wire Products*, 313 NLRB 989, 993 (1994) (current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). Therefore, the ALJ correctly resolved that the credibility of these witnesses should be enhanced in the case at hand because the witnesses all gave testimony, against their interests, while Respondent's representative sat in the hearing room.

Five Counsel for the General Counsel witnesses were former employees who left Respondent to pursue other opportunities. The ALJ did not err in finding these former employee witnesses credible as they had nothing to gain by their testimony and were therefore highly

credible. Two Counsel for the General Counsel witnesses, Mario Smith and Annie Scott, were discharged by Respondent after the Board election but prior to the hearing. The ALJ did not err in finding these former employee witnesses credible as each testified in a straightforward, consistent, and detailed manner.

All the witnesses Respondent called to testify were current or former supervisors or agents of Respondent. Much of the testimony of these witnesses was elicited with leading questions during direct examination. Thus, the testimony of Respondent's witnesses should be afforded less weight than the testimony of Counsel for the General Counsel's witnesses and discredited where appropriate. *T.M.I.*, 306 NLRB 499 (1992); *H.C. Thomson*, 230 NLRB 808 (1977). The ALJ correctly credited, as uncontradicted, the testimony of Counsel for the General Counsel's witnesses where Respondent's witnesses failed to deny or contradict the testimony of Counsel for the General Counsel's witnesses. *Mark Lines, Inc*., 255 NLRB 1435 (1981) (finding a violation of Section 8(a)(1) where General Counsel's evidence offered through witness of 'less than impressive credibility' was not rebutted and therefore confirmed by uncontradicted proof). When a party presents a knowledgeable witness but fails to elicit testimony about a matter which the witness would normally testify to; or fails to question its own witness about matters which would normally be thought reasonable, an adverse inference may be drawn against that party. *Greenbriar Valley Medical Center*, 360 NLRB 994, 994 fn. 1, 998 fn. 11 (2014), citing *Douglas Aircraft*, 308 NLRB 1217 (1992).

Finally, the ALJ did not err when he drew an adverse inference from Respondent's failure to call any material witnesses reasonably assumed to be favorably disposed toward the party. A trier of fact may draw the "strongest possible adverse inference" against a party that fails to present a material witness presumed to be favorable to it, sometimes called the "missing witness rule."

Flexsteel Industries, Inc., 316 NLRB 745, 758 (1995); *Douglas Aircraft Company*, 308 NLRB 1217, 1217 fn. 1 (1992); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977). In the instant case, Respondent did not call Chief People Officer Jerome Miller to testify at the hearing. None of Respondent's witnesses refuted the accuracy of the recording[3] or transcripts during their testimony. Nor did the Respondent offer any other evidence suggest that the recording and transcript of Miller's speech was inaccurate. Therefore, the Board should affirm the ALJ's credibility resolutions.

B. The ALJ Correctly Applied the Proper Legal Analysis and Found that Statements Made by Hyunho Kim and in a Speech by Jerome Miller Were Threats of Plant Shutdown or Loss of Employment. [Respondent exceptions 1, 2, 4, 5, 27-27, 61, and 63-66].

i. Facts

One the day before the election, Chief People Officer Jerome Miller held a mandatory employee meeting. (ALJD 3:10-11). During the meeting, Miller made a series of coercive statements, threatening plant shutdown and/or job loss, loss of benefits, and futility if the Union won the October 2017 election. (ALJD 3:15-5:40; GC Exh. 7; GC Exh 8). Miller told employees that "[w]e cannot have this place shut down because we did not decide to get together and work together." (ALJD 3:37). Miller told employees that tires could be produced elsewhere **"**If they strike…" (referring to the Union going on strike). (ALJD 4:3-4). Miller further stated, "we all could be adversely impacted if the business closes down…" (ALJD 3:46-46). Miller threatened

[3] Respondent renews its objection to the ALJ's admission of Counsel for the General Counsel's exhibits 7 and 8 because the meeting was not recorded in its entirety. Respondent cites Federal Rules of Evidence Rule 106, arguing that a partial recording may create a misleading impression when statements are taken out of context. However, General Counsel called two witnesses who credibly testified about the beginning of the meeting, prior to the beginning of the recording. Finally, Respondent produced no evidence or testimony to suggest that the unrecorded part of the meeting provided some alternative context to Miller's recorded statements.

that collective bargaining would be futile stating "…all of you who are not aware of that, collective bargaining; we can start from scratch." (ALJD 5:31-32).

Two of Counsel for the General Counsel witnesses testified that President Kim told them that employees' jobs were in jeopardy and/or Respondent would not survive with a Union. (ALJD 2:36; 3:3-4). Kim denied making these statements. (ALJD 5:48-49). However, during Respondent's direct examination, Kim testified that he asked employees to "vote no for the survival of Kumho tires." (ALJD 6:1). Kim went on to testify that he told employees that the company was doing poorly financially and that if they continued with the Union employees could lose their jobs. (ALJD 6:3).

ii. Argument

An employer violates Section 8(a)(1) of the Act when its statements to employees reasonably tend to interfere with the free exercise of employee rights under the Act. *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). Predictions of plant shut down, loss of contracts, loss or transfer of work, lost jobs, or changes in working conditions or benefits must be based on objective facts. 395 U.S at 618. A prediction of plant closure as a possibility rather than a certainty also violates the Act. *Daikichi Corp*., 335 NLRB 622 (2001). An employer must explain how a change in existing benefits and working conditions could result from the give-and-take of future collective bargaining rather than suggesting that employees, by entertaining the prospect of union representation, were courting the wrath of the employer. *Franklinton Preparatory Academy*, 366 NLRB No. 67, slip op. at 2 (April 20, 2018). The burden of proof is on the employer to show that a prediction was based on objective fact. *Schaumburg Hyundai*, 318 NLRB 449 (1995).

Prefacing threatening statements with phrases such as "in event of a strike" or "if they strike" will still be found to be unlawful without an objective basis for the threat. 395 U.S at 588.

The *Gissel* court also held that an employer's statement that a strike "could lead to the closing of the plant," without an objective basis for the prediction, violated the Act. 395 U.S at 588. See also *Metro One Loss Prevention Service Group*, 356 NLRB 89 (2010) (finding that the statement "if there was a strike we 'could' lose our jobs," without an objective basis that a strike was a certainty, is merely a prediction and therefore a violation of the Act).

The record evidence demonstrates that Miller and Kim made multiple coercive statements, threatening plant shutdown and/or the loss of jobs in violation of Section 8(a)(1) of the Act. Further, Miller and Kim made the statements without providing any basis or objective facts to support their predictions. Therefore, the ALJ correctly applied the proper legal analysis in finding that Miller and Kim made unlawful threats and the Board should affirm the ALJ's findings and conclusions of law.

C. The ALJ Correctly Applied the Proper Legal Analysis and Found that Statements Made by Respondent's Supervisors were Threats of Plant Shutdown or Loss of Employment. [Respondent exceptions 11, 12, 16, 38-46, 51-52, 57, and 63-66].

i. Facts

The record evidence indicates that ten of the 18 witnesses for Counsel for the General Counsel credibly testified that in the two to three weeks prior to the election, nine of Respondent's supervisors and/or agents made a series of coercive statements, threatening plant shutdown and/or job loss, and loss of benefits, if the Union won the October 2017 election. (ALJD 16:10 – 16-36). The statements were made during pre-shift meetings and during one-on-one or small group conversations. (ALJD 16:10-16:36). The threatening statements were similar to, and consistent with, the threatening statements made by Chief People Officer Jerome Miller and President Hyunho Kim. (ALJD 14:13-14).

Two of Counsel for General Counsel's witnesses credibly testified that during a pre-shift meeting Respondent's supervisor Harry "Kip" Smith threatened employees by stating that they should think about whether they wanted a Union because Kumho could shut the plant down and/or send the tire molds back to Korea. (ALJD 8:14-19). Smith corroborated these witnesses' account, stating that he told employees that if the Union were to come in and employees go on strike, Respondent "may pull the molds out and ship them over to Korea…." (ALJD 8:26-28). Two employee witnesses testified that Smith showed them a picture of a "help wanted" sign on his phone, telling them he had found them new jobs in case the Union were voted in. (ALJD 8:35-39). Smith corroborated this testimony but alleged that he showed the "help wanted" picture to employees after the election was over. (ALJD 8:41-43).

Two of Counsel for General Counsel's witnesses credibly testified that Respondent's supervisor Michael Geer threatened employees with loss of contracts and having equipment shipped back to Korea if the Union won. (ALJD 9:6-7; 9:22-23). Current employee Jason Bailey testified that during a pre-shift meeting, Geer told employees that if the Union won the election, Respondent could lose some of its contracts. (ALJD 9:6-7). Geer corroborated this testimony stating that he told employees that if there was a strike that interrupted production, customers might switch to other suppliers. (ALJD 9:7-8). Geer testified that his comment about customers switching to other suppliers was in response to a question about what might happen if there was a strike. (ALJD 9:8-9). Former employee Annie Scott testified that during a one-on-one conversation, Geer told her that if the Union won the election, Respondent could lose contracts and ship equipment back to Korea. (ALJD 9:22-23).

Counsel for the General Counsel's witness Anthony Arnold, a former employee, credibly testified that, following a supervisor meeting, his immediate supervisor Brad Asbell and two other

supervisors Eric Banks and Chris Wilson stated that if the Union won the election the plant would shut down. (ALJD 9:45-10:5). All three supervisors denied making the threatening statement. (ALJD 10:6-8).

Counsel for the General Counsel's witness Christopher Daniely, a current employee, credibly testified that during a pre-shift meeting Respondent's supervisor Michael Whiddon told employees that if they selected the Union it was possible that there would be a strike and employees could lose their jobs. (ALJD 10:25-28). On direct examination, Whiddon stated that he had never "directly" told Daniely that if there was a strike, it could negatively impact the Respondent. (ALJD 10:29-30). Daniely testified that the statement was made to employees during a pre-shift meeting, not to Daniely directly, thus Daniely's testimony remains uncontradicted. (ALJD 10:31-34).

Counsel for the General Counsel's witness Jemel Webb, a current employee, credibly testified that during a one-on-one conversation with supervisor Freddy Holmes, Holmes stated that Respondent would lose contracts if the Union were voted in because Kia and Hyundai did not do business with unionized companies. (ALJD 10:42-43).

Two of Counsel for General Counsel's witnesses credibly testified that Respondent's supervisor Stevon Graham told them that if the Union won the election, Respondent may shut down because it would lose contracts with Kia and Hyundai. (ALJD 11:9-10).

ii. Argument

As discussed above in section B(ii) above, an employer violates Section 8(a)(1) of the Act when it's supervisors or agents threaten plant shutdown or loss of jobs without providing a basis for their predictions. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The record evidence demonstrates that the ALJ correctly applied the proper legal analysis to determine that Respondent

violated Section 8(a)(1) by threatening employees with plant would shut down and/or employees would lose jobs if the Union were voted in.

The record evidence demonstrates that many of Respondent's supervisors and/or agents made a series of coercive statements, threatening plant shutdown and/or the loss of jobs in violation of Section 8(a)(1) of the Act. Further, the supervisors and agents made the statements without providing any basis or objective facts to support their predictions. Therefore, the ALJ correctly applied the proper legal analysis in finding that Respondent's supervisors and agents made unlawful threats and the Board should affirm the ALJ's findings and conclusions of law.

D. The ALJ Correctly Applied the Proper Legal Analysis and Found that the Interrogations of Employees by Respondent's Supervisors and Agents were Unlawful. [Respondent exceptions 6 – 10, 13, 21, 47-50, 55, and 63-66].

i. Facts

The record evidence indicates that nine of the 18 witnesses for Counsel for the General Counsel credibly testified that in the two to three weeks prior to the election, nine of Respondent's supervisors and/or agents interrogated them about their Union sentiments. (ALJD 17:40 – 18:5). The interrogations ranged from short conversations in the work area to calling employees into an office for a more formal conversation about the Union. (ALJD 6:18; 6:35-38; 7:10; 7;16; 7:22-23; 9:11-12; 10:10-16; 10:39-40; 11:14-15; 12-5-6; 12:23; 12:45-46; 13:25-28). Additional interrogations include asking employees if they wanted a "vote no" hat. (ALJD 13:25-28).

Two of Counsel for General Counsel's witnesses credibly testified that Respondent's agent and consultant Bill Monroe interrogated them about their Union sympathies by asking why Respondent needed a Union and how they felt about the Union. (ALJD 6:18; 6:35-38). Three witnesses testified that Supervisor Harry "Kip" Smith interrogated them about their Union sympathies by asking how they felt about the Union. (ALJD 7:10; 7:16; 7:22-23). These employee

witnesses' testimonies were clear and concise and in some instances uncontested. (ALJD 6:43; 7:11-12).

Counsel for General Counsel's witness Chauncey Pryor, a current employee, testified that prior to the election supervisor Eric Banks called employees into the supervisor office one-by-one. (ALJD 10:11). Banks' supervisor Troy Collins was also present in the office. (ALJD 10:12). Pryor testified that Banks asked him how he felt about the Union and discussed how the Union would impact overtime. (ALJD 10:14-15).

Counsel for General Counsel's witness Landon Bradley, a current employee, testified that prior to the election, his supervisor, Chris Butler, approached him in the breakroom and asked Bradley if he wanted a "Vote No" hat. (ALJD 13:25-26). Butler did not testify about this incident, therefore, Bradley's testimony regarding this interrogation is uncontradicted. (ALJD 13:27-28).

ii. Argument

The record evidence demonstrates that the ALJ correctly applied the proper legal analysis to determine that Respondent violated Section 8(a)(1) by interrogating employees during one-on-one conversations. An employer's interrogation of employees about their sentiments regarding a particular union is not a per se violation of the Act. However, the Board has determined that where the interrogation is found to be coercive in light of all surrounding circumstances, it will be deemed to be in violation of the Act. *Rossmore House*, 269 NLRB 1176 (1984) enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board applies the test set forth in *Rossmore House* to determine whether the circumstances surrounding the interrogation warrant a finding of a violation of the Act. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1182-83 (2011). The test involves a case-by-case analysis of various factors, including (1) the history of the employer's attitude and/or hostility toward or discrimination against

union activity; (2) the nature of the information sought; (3) the identity and company rank of the interrogator; (4) the place and manner of the interrogation; (5) the truthfulness of the employee's response; (6) whether the employer had a valid purpose in obtaining the information; (7) if so, whether the purpose was communicated to the employee; and (8) whether the employer assures that no reprisals will be taken if the employee supports the union. See *id*.; see also *Fiber Glass Sys*., 298 NLRB 504 (1990).

The Board has determined that one need not apply the factors mechanically, but rather that the factors are useful indicia in evaluating the legality of an interrogation. *Camaco Lorain Mfg.*, 356 NLRB 1182 (2011). Additionally, the standard is an objective one, considering whether the questioning would reasonably tend to coerce the employee and thus restrain the exercise of Section 7 rights. *ManorCare Health Services*, 356 NLRB 202, 218 (2013), *Multi-Ad Services*, 331 NLRB 1226, 1227–28 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The determination does not turn on whether the questioned employee felt intimidated. *Id*.

Further, inquiries about union sympathies, even when directed at a known union supporter, may be a violation of Section 8(a)(1) where, as here, an employer repeatedly tells its employees that a union will doom the company. The Board has found questioning employees about their feelings about a union to be unlawful even when the employees are open union supporters. *Lenkei Bros. Cabinet Co*. 290 NLRB 1017,1019, 1022 (1988) (unlawful interrogation where supervisor asked employee "about what the union adherents wanted"); *Systems West LLC*, 342 NLRB 851, 857 (2004) (company president asking employees "why do you want to go Union" constituted an unlawful interrogation); *Fontaine Body and Hoist C*o., 302 NLRB 863, 864 (1991) (the questioning of open union supporters about their union sentiments, which was part of a pattern of interrogation and was accompanied by threats and other unlawful conduct, constituted an illegal

interrogation). Finally, the Board has held that offering campaign paraphernalia, such as "Vote no," hats, is an interrogation because it requires employees to make an observable choice related to his union sentiments. *A.O. Smith*, 315 NLRB 994 (1994).

In the instant case, the Respondent's hostilities toward the Union are abundantly clear. The interrogations took place during an organizing campaign during which the Respondent engaged in a variety of unfair labor practices in an effort to convince its employees to reject the Union. Respondent and its supervisors and agents consistently threatened employees with plant shutdown, loss of jobs, and loss of benefits if the Union were voted in. In this environment, any question regarding Union sentiment by Respondent is coercive. Therefore, the ALJ correctly applied the proper legal analysis in finding that Respondent's supervisors and agents unlawfully interrogated employees in violation of Section 8(a)(1) of the Act and the Board should affirm the ALJ's findings and conclusions of law.

E. The ALJ Correctly Applied the Proper Legal Analysis and Found that Respondent Unlawfully Interfered with Employees' Exercise of Section 7 Rights by Threatening Changed Working Conditions; Stricter Rule Enforcement; Loss of Benefits; Surveilling and Creating Impression of Surveillance; Instructing Employees not to Discuss the Union with Coworkers; and Threatening to Discharge Employees Who Supported the Union. [Respondent exceptions 11, 12, 14, 26, 51-54, 56-58, and 63-66].

i. Facts

Witnesses for Counsel for the General Counsel credibly testified that in the two to three weeks prior to the election Respondent's supervisor Harry "Kip" Smith unlawfully threatened employees with changed working conditions and loss and/or change of benefits. (ALJD 18:7-9). During this same time period, supervisor Michael Geer threatened unspecified reprisals and instructed employees not to speak to other employees about the Union. (ALJD 18:23-24). Geer also threatened discharge by suggestion Respondent would "get rid of" the employees who voted

for the Union. (ALJD 19: 13-14). Supervisor Aaron Rutherford created the impression that the Respondent engaged in surveillance of employee's Union activities. (ALJD 18:35-37). Rutherford also threatened stricter rule enforcement and unspecified reprisals. (ALJD 19:25-27).

Four of Counsel for the General Counsel's witnesses credibly testified that Supervisor Smith told them that he would not be able to help them with work tasks if they vote the Union in. (ALJD 7:28 - 8:1-4). Smith testified that he told employees that he "might" not be able to help employees if the Union were voted in. (ALJD 8:1-2).

Former employee Van McCook testified that following his request for a day off, Smith responded that McCook had not given sufficient notice for his request for the time off. (ALJD 8:6-7). McCook testified that Smith told him that if the Union were voted in, Smith would have to strictly apply Respondent's time off policy and would not be able to give McCook the day off. (ALJD 8:8-9). McCook testified that Smith told him that he was going to wait to approve the time off request so that McCook could "think about it." (ALJD 8:7-8). Smith denied telling McCook that he was going to delay approving the time off so that McCook could "think about" whether he wanted the Union. (ALJD 8:10-13). Smith stated that the delay in approving the time off request was due to the need to check the work schedule to verify no other employee was off that day. (Tr. 455).

Counsel for the General Counsel's witness Annie Scott, a former employee, credibly testified that supervisor, Michael Geer, told her that talking to employees about the Union could constitute harassment and asked her not to talk to anyone about the Union. (ALJD 9:26-28). Geer testified that he received a complaint from another employee that Scott was bothering her. (ALJD 9:28-29). Geer testified that he told Scott that if somebody asks her to stop talking to them, she should stop, or it could be considered harassment. (ALJD 29-30).

Counsel for the General Counsel's witness Brandyn Lucas, a current employee, credibly testified that after the election results were announced, he overheard supervisor Geer state that Respondent needed to find out which 136 employees had voted for the Union and get rid of them. (ALJD 9:32-36). Lucas testified that he and approximately ten other employees were in a break area about an hour after the votes were tallied. (ALJD 9:32-33). Lucas testified that Geer was also in the break area, speaking to another supervisor. (ALJD 9:33). Lucas testified that he reported the conversation to safety coordinator Cliff Kleckley, who suggested Lucas report it to human resources. (ALJD 9:38-39). Geer denied the allegation and Kleckley did not provide testimony regarding his alleged conversation with Lucas. (ALJD 9:40).

Counsel for the General Counsel's witness Mario Smith, a former employee, credibly testified that supervisor Aaron Rutherford informed him that Rutherford did not talk to Smith about the Union because Rutherford had heard Smith was pro-Union. (ALJD 11:26-27). Smith also testified that Rutherford stated that if the Union won the election, team leaders would have to "go by the book" in enforcing company rules and would no longer be able to help unit employees perform work tasks. (ALJD 11:29-31). Rutherford denied threatening stricter rule enforcement. (ALJD 11:39-40).

Counsel for the General Counsel's witness Marcus Horne, a current employee, credibly testified that after the election supervisor Rutherford informed him that Respondent was aware of what employees were posting on a pro-union website. (ALJD 11:33-37). Horne testified that the conversation began when he asked Rutherford for details related to the discharge of another employee, Mario Smith. (ALJD 11:33-34). Horne testified that Smith was fired for posting material on the employees' pro-union website. (ALJD 11:34-35). Horne testified that Rutherford told him that the Respondent had "people watching that website." (ALJD 11:36). Horne stated that

he asked why the other employees who posted to the website had not be discharged or disciplined. (ALJD 11:36-37). Horne testified that Rutherford responded by saying that Respondent would be taking care of those other employees also. (ALJD 11:37). Rutherford denied telling Horne why Smith was discharged and denied threatening Horne with discipline in retaliation for what Horne posted on Facebook. (ALJD 11:40-41). However, Rutherford did not deny or even address Horne's testimony that Respondent "would take care of" employees who had posted to the employees' pro-union website. (ALJD 11:42-43). Additionally, Rutherford did not contradict Horne's testimony that Respondent was watching the pro-union website. (ALJD 11:45).

ii. Argument

As discussed above in section B(ii), an employer violates Section 8(a)(1) of the Act when its supervisors or agents threaten changed working conditions, stricter rule enforcement, and unspecified reprisals; engage in surveillance or create the impression of surveillance; and discharge employees if they support a union. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).The record evidence demonstrates that the ALJ correctly applied the proper legal analysis to determine that Respondent violated Section 8(a)(1) by threatening employees with changed working conditions, stricter rule enforcement, and discharge if they supported the Union. The evidence further demonstrates that Respondent instructed employees not to discuss the Union with coworkers, engaged in surveillance and/or created the impression of surveillance.

The Board and the courts have long held that an employer violates Section 8(a)(1) by threatening employees with discharge while they are exercising their Section 7 rights. *NLRB v. Neuhoff Bros., Packers, Inc.*, 375 F.2d 372, 374 (5th Cir. 1967). In determining whether a statement constitutes an unlawful threat in violation of Section 8(a)(1) of the Act, the Board does not consider subjective factors, but rather, under all the circumstances, whether the alleged

statement reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed in Section 7 of the Act. *Sunnyside Home Care Project,* 308 NLRB 346, 346 at fn.1 (1992);*Reeves Brothers, Inc.,* 320 NLRB 1082, 1084 (1996). Under this test, Respondent's supervisor Michael Geer's threat that Respondent needed to find out which employees voted for the Union and get rid of them is a clear threat of discharge in retaliation for exercising Section 7 rights. While Geer's threat was not made directly to a unit employee, the threat was made in a break area with multiple unit employees were present. Additionally, the statement was made within a short period of time after the election results were tallied and following several weeks of aggressive anti-union campaigning by Respondent and its supervisors and agents. Under these circumstances, Geer's statement that Respondent needed to get rid of the employees who voted for the Union are coercive, threatening retaliation for past Union activity and reasonably tends to restrain employees from engaging in future Union activity.

A threat does not have to be explicitly stated - a violation can be found based on a non-specific threat of reprisal. Based on the employee's reasonable belief there would be unspecified reprisals if he did not stop his union activity, the Board has found a violation where an employer told an employee who was participating on behalf of his union in a workplace time-study that "there would be problems" if the employee did not return to work in ten minutes. *Atlas Logistics Group Retail Services (Phoenix),* 357 NLRB 353, 353 fn. 2 (2011). See also *St. Margaret Mercy Healthcare Centers,* 350 NLRB 203, 205 (2007) (threat of unspecified reprisals where employee was told "she should direct her concerns to management rather than discussing them with her coworkers and 'bringing them down'"). The Board has repeatedly found that warnings to employees to "be careful," when made in the context of an employee's protected activity, convey "the threatening message that union activities would place an employee in jeopardy." *Gaetano &*

Associates, 344 NLRB 531, 534 (2005) (supervisor's caution that an employee should "be careful" talking to the union agent was an unlawful threat of unspecified reprisal), citing *St. Francis Medical Center*, 340 NLRB 1370, 1383-1384 (2003); *Jordan Marsh Stores Corp*., 317 NLRB 460, 462 (1995) (supervisor's "watch out" statement was an unlawful implied threat).

The record evidence establishes that Rutherford implied that Horne and other employees would be disciplined or discharged for posting to the pro-Union website. Rutherford told Horne that another employee had been discharge for posting to the website, that Respondent was aware that other employees were posting on the website, and that Respondent would "be taking care of" those other employees. Rutherford's statements, especially when considered in the context of the Respondent's aggressive anti-Union campaign, constitute a clear threat that engaging in Union activities would jeopardize Horne's employment.

Similarly, a threat of stricter discipline in response to union or protected activities violates the Act. *Schrock Cabinet Co*., 339 NLRB 182, 185 (2003) (affirming the administrative law judge's finding of a violation where the respondent threatened stricter discipline and enforcement of rules because the employee threatened to file a grievance). The evidence demonstrates that Rutherford violated Section 8(a)(1) of the Act when he informed Mario Smith that team leads would not be able to look out for employees anymore, they would have to go "strictly by the book" if the Union were voted in because he did not provide any basis in objective fact for his prediction. Similarly, Geer violated Section 8(a)(1) when he instructed Scott not to discuss the Union with other employees or it "could be considered harassment," implying that Scott would be subject to unspecified reprisals if she continued to engage in Union activities.

Finally, it is settled Board law that an employer creates an unlawful impression of surveillance when, under all relevant circumstances, a reasonable employee would assume from the

employer's statement that their union or other protected activities have been under surveillance. *Frontier Telephone of Rochester, Inc*., 344 NLRB 1270 (2005); *Bridgestone Firestone South Carolina*, 350 NLRB 526 (2007). When an employer tells its employees that it is aware of their union activities, without telling them the source of that information, the employer violates Section 8(a)(1) of the Act. *Metro One Loss Prevention Services*, 356 NLRB 89 (2010). When an employee is left to speculate as to how an employer obtained its information, it is reasonable for them to conclude that the information was obtained through monitoring by the employer. *Id*. In the instant case, Respondent's supervisor, Rutherford, told employees that Respondent was aware, and was watching, employees' activities and posts on the pro-union website, without telling employees the source of its information in violation of Section 8(a)(1) of the Act.

The ALJ correctly applied the proper legal analysis in finding that Respondent's supervisors and agents unlawfully threatening changed working conditions; stricter rule enforcement; loss of benefits; surveilling and creating impression of surveillance; instructing employees not to discuss the union with coworkers; and threatening to discharge employees who supported the union in violation of Section 8(a)(1) of the Act and the Board should affirm the ALJ's findings and conclusions of law.

V. CONCLUSION

Counsel for General Counsel respectfully urges that the Board should affirm the ALJ's findings and conclusions and adopted his proposed remedial order.

Respectfully submitted,

_/s/ Kami Kimber_____
Kami Kimber
Counsel for the General Counsel
National Labor Relations Board, Region 10

_/s/ Matthew J. Turner_____
Matthew J. Turner
Counsel for the General Counsel
National Labor Relations Board, Region 10

Dated this 1st day of August 2019.

CERTIFICATE OF SERVICE

This is to certify that on August 1, 2019, copies of the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision were served by email on:

W. Melvin Haas, III
W. Jonathan Martin, II
Sul Ah Kim
Constangy, Brooks, Smith & Prophete, LLP
577 Mulberry Street, Suite 710
Macon, GA 31201-8588
mhaas@constangy.com
jmartin@constangy.com
sakim@constangy.com

Keren Wheeler
United Steel, Paper and Forestry,
Rubber, Manufacturing, Energy Allied
Industrial and Service Workers International Union
60 Boulevard of Allies, Suite 807
Pittsburgh, PA 15222
kwheeler@usw.org

Richard P. Rouco
Quinn, Connor, Weaver, Davies & Rouco, LLP
2-20th Street North Suite 930
Birmingham, AL 35203
rrouco@qcwdr.com

/s/ Kami Kimber
Kami Kimber
Counsel for the General Counsel
National Labor Relations Board, Region 10
233 Peachtree Street, NE
Harris Tower - Suite 1000
Atlanta, Georgia 30303-1504
Phone: (470) 343-7487
Fax: (404) 331-2858
Email: kami.kimber@nlrb.gov